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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THOMAS U. COE et al.,

Plaintiffs and Appellants,

v.

JAMES HARDIE BUILDING PRODUCTS, INC.,

Defendant and Respondent.

H040160
(Santa Clara County
Super. Ct. No. CV192304)

I. INTRODUCTION

In 2011, appellants Thomas U. Coe and Norma Coe filed the instant action against respondent James Hardie Building Products, Inc. (JHBP), in which they alleged that JHBP was liable for supplying the defective roofing product, Hardislate, that was installed when their house was built about 10 years earlier. JHBP moved for summary judgment on the ground that the Coes' action was barred under the doctrine of res judicata, since all claims against JHBP arising from that roofing product had been resolved by the final order and judgment in a prior nationwide class action against JHBP in Washington state court, *Read et al. v. James Hardie Building Products, Inc.* (Super. Ct. Kings County, Wash., 2002, No. 00-2-17945-6SEA) (*Read* class action).

The Coes did not dispute that JHBP's motion for summary judgment satisfied the first two elements of res judicata: identity of claims and finality of the prior judgment.

However, they argued that JHBP's motion for summary judgment failed to establish the third element of res judicata: that they were parties or in privity with parties to the *Read* class action. The Coes asserted that they were not bound by the Washington state court's final order and judgment as parties to the *Read* class action because they had not received actual notice of the class action. They also argued that triable issues of fact existed as to whether the notice given was adequate to notify users of the Hardislate product of the *Read* class action and to comply with due process.

The trial court granted JHBP's motion for summary judgment and entered judgment in JHBP's favor on the ground that the Coes' action was barred by the affirmative defense of res judicata. The court took judicial notice that the Washington state court in the *Read* class action had previously determined that "[t]he notice provided fully and accurately informed the Class Members of all material elements of the proposed Settlement and their opportunity to participate in or be excluded from it; was the best notice practicable under the circumstances; was valid, due and sufficient notice to all Class Members; and complied fully with [Superior Court Civil Rules] 23, the United States Constitution, due process, and other applicable law."

For the reasons stated below, we agree with the trial court that the Coes' action against JHBP is barred by the affirmative defense of res judicata as a matter of law, and we will affirm the judgment.

II. FACTUAL BACKGROUND

Our factual summary is drawn from the parties' separate statements of fact and the evidence they submitted in connection with the motion for summary judgment.

In 1999 the Coes entered into a contract with James Kramer Construction, Inc. (Kramer), a general contractor, to build a new house on their property in Saratoga. Kramer hired a subcontractor, Raindance Roofing, to install the roof on the house. Raindance Roofing used a roof shake product called Hardislate, which was manufactured

or distributed by JHBP and had a 50-year warranty. The new house was completed in 2001.

The Coes first noticed a problem with the roof in 2008, when the Hardislate tiles cracked after house painters went on the roof. In 2010, a solar contractor refused to give the Coes a quote due to the presence of Hardislate tiles. The Coes then became aware that the Hardislate tiles had been the subject of litigation several years earlier. In 2011, Thomas Coe visited a website that described a class action lawsuit in Washington state in which it was alleged that Hardislate was a defective product. The website informed him that the Washington state class action had settled in 2001. Other than the website, the Coes did not receive any notice of the *Read* class action lawsuit.

A final order and judgment was filed in the *Read* class action on February 14, 2002. The final order and judgment of the Washington state court stated that the class included: "All Persons that own or owned structures in the United States on which any roofing products manufactured by [JHBP], or distributed by JHBP in the United States under a Hardie brand name ('JHBP Roof Shakes'), have been installed at any time prior to the date of final approval by the Court."

The February 14, 2002 final order and judgment also stated that the Washington state court approved the parties' settlement of the class claims "as fair, adequate, reasonable, and in the best interests of the Class." The class claims that were settled included claims for "monetary losses or property damage to Class Members' homes . . . arising out of or relating to JHBP Roof Shakes." Class members who had not opted out of the class were "barred and permanently enjoined from prosecuting" the claims that were the settled by the settlement agreement.

After learning of the *Read* class action settlement, the Coes filed a claim with the independent claims administrator for the *Read* class action claims program. In early 2012, the Coes received an early settlement offer from the claims administrator

in the form of a check for $10,330.32. The Coes did not cash the settlement check. The *Read* class action claims program concluded in February 2012.

III. PROCEDURAL BACKGROUND

A. *The Pleadings*

The first amended complaint filed by the Coes in December 2011 named Kramer[1] and JHBP as defendants. The causes of action asserted against JHBP included negligence, breach of express warranty, breach of implied warranty of fitness, and declaratory relief (seeking binding arbitration). The Coes alleged that defendants had supplied a defective roofing product and sought damages in excess of $25,000 and attorney's fees.

JHBP's answer to the first amended complaint included numerous affirmative defenses, including: "The Complaint may be barred and the action may need to be abated, in whole or in part, because another action presenting similar issues and involving overlapping parties has been adjudicated."

B. *The Motion for Summary Judgment*

JHBP moved for summary judgment on the ground that the Coes' action was barred by the doctrine of res judicata because all of their claims arising from JHBP's roofing products had been previously adjudicated in the *Read* class action.

JHBP requested judicial notice of the February 14, 2002 final order and judgment in the *Read* class action, which JHBP asserted would show that the Coes were class members and the *Read* class action involved the same causes of action and the same parties as the instant action. JHBP also asserted that the Washington state court had found that the notice given to class members was "the 'best notice practicable under the circumstances' " and was sufficient under the United States Constitution and federal and state law. Additionally, JHBP emphasized that the final order and judgment in the

[1] Kramer is not a party to this appeal.

Read class action expressly barred subsequent actions raising the same claims by class members who had not timely opted out.

C. *Opposition to the Motion for Summary Judgment*

The Coes argued that the motion for summary judgment should be denied because JHBP had presented no evidence to show that the Coes were parties to the *Reed* class action, and therefore the bar of res judicata did not apply. According to the Coes, they were not parties because they did not receive actual notice of the *Read* class action. The Coes also argued that the trial court could not take judicial notice of the truth of the Washington state court's hearsay finding in its final order and judgment that the notice given in the *Read* class action was sufficient and satisfied due process.

Alternatively, the Coes asserted that triable issues of fact existed as to whether the notice given was adequate to notify users of the Hardislate product of the *Read* class action. According to the Coes, the notice was inadequate and violated due process because there was no attempt to directly contact purchasers of the Hardislate product (which their roofing expert said could be done) and there was no publication of the class action notice in a newspaper.

Finally, the Coes denied that they were members of the *Read* class action because they had filed a claim with the *Reed* class action claims administrator, explaining that they did not cash the check they had received from the claims administrator and they had ceased the claims administration process.

D. *The Trial Court's Order*

The trial court granted the motion for summary judgment in its August 1, 2013 order. As stated in the order, the trial court found that with respect to the elements of JHBP's affirmative defense of res judicata, the Coes did "not take issue with the finality of the Class Action on its merits or the identity of claims, but instead apparently argue that they were not parties or parties in privity to the Class Action because they were never served and did not receive actual notice of the Class Action."

The trial court rejected the Coes' notice argument, determining that for purposes of res judicata the court could take judicial notice that the Washington state court had made a finding in the *Read* class action that JHBP provided "the 'best notice practicable under the circumstances' to class members; that such notice 'was valid, due and sufficient' as to all class members; and that it fully complied with CR 23,[2] the United States Constitution, due process, and other applicable law." The August 1, 2013 order indicates that the trial court therefore concluded that JHBP had established the affirmative defense of res judicata as a matter of law.

IV. DISCUSSION

On appeal, the Coes' primary contention is that the trial court erred in granting JHBP's motion for summary judgment because there are triable questions of fact as to whether the notice given in the *Read* class action was adequate to make them members of the class and bar their action against JHBP under the doctrine of res judicata.

A. *Appealability*

As a preliminary matter, we note that the Coes' notice of appeal filed on September 13, 2013, states that they appeal from the August 1, 2013 order granting JHBP's motion for summary judgment. An order granting a motion for summary judgment is not an appealable order. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 14, fn.1.) "An appeal lies from the judgment, not from an order granting a summary judgment motion. [Citations.]" (*Ibid.*) Here, the judgment was not entered until September 25, 2013, and therefore the Coes' August 1, 2013 notice of appeal was premature.

We will exercise our discretion under California Rules of Court to hear a premature appeal: "The reviewing court may treat a notice of appeal filed after the

[2] In Washington state courts, "[c]lass certification is governed by [Superior Court Civil Rules] 23." (*Moeller v. Farmers Ins. Co. of Wash.* (Wash. 2011) 267 P.3d 998, 1004.)

superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(2); see *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.)

Before addressing the merits of the Coes' appeal, we will outline the standard of review for an order granting a motion for summary judgment.

B. *The Standard of Review*

The standard of review for an order granting a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The trial court's stated reasons for granting summary judgment are not binding on the reviewing court, "which reviews the trial court's ruling, not its rationale. [Citation.]" (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498.)

In performing our independent review, we apply the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*).)

"We then examine the moving party's motion, including the evidence offered in support of the motion." (*Baptist*, *supra*, 143 Cal.App.4th at p. 159.) A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code of Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied. However, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable

issue of material fact. (Code of Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.)

In determining whether the parties have met their respective burdens, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.) Thus, a party " 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.)

Keeping the standard of review in mind, we will independently determine whether JHBP's motion for summary judgment should have been granted on the ground that the undisputed facts show that the Coes' action is barred as a matter of law under the affirmative defense of res judicata.

C. *Res Judicata—General Principles*

The California Supreme Court has stated that " '[r]es judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 -897, fn. omitted (*Mycogen*).)

"A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief. " ' [Citation.] A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.' [Citation.]" (*Mycogen, supra,* 28 Cal.4th at p. 897.)

" ' "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]" ' [Citation.]" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) "[F]or purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.]" (*Id*. at p. 798.)

D. *Analysis*

1. The Parties' Contentions

The Coes do not argue that JHBP's motion for summary judgment failed to satisfy the first two elements of res judicata: identity of claims and finality of the prior judgment. In arguing that JHBP failed to establish that res judicata bars their action as a matter of law, we understand the Coes to contend that JHBP's motion for summary judgment failed to establish the third element of res judicata: that they were parties or in privity with parties to the *Read* class action.

In support of their contention, the Coes assert that they could not be bound by the Washington state court's final order and judgment as members of the *Read* class action due to the inadequacy of the class action notice provided by JHBP. Specifically, the Coes argue that (1) there is a triable issue of fact as to whether the notice given in the *Read* class action was adequate since there was no individual notice to Hardislate consumers; (2) the notice given in the *Read* class action did not satisfy due process because the Coes did not receive direct notice during the pendency of the class action; (3) JHBP did not present any evidence to show that direct notice to individual consumers would have been "overly cumbersome, expensive, or that it was even considered;" (4) the lack of direct notice to individual consumers violated due process because it deprived the Coes of the ability to opt out of the *Read* class action; and (5) the trial court erred in taking judicial notice of the truth of the final order and judgment in the *Read* class action.[3]

JHBP responds that it is well established that individual notice to all class members is not required to satisfy due process, and therefore a class member who did not receive actual notice may be bound by the class action. JHBP also points out that the Washington state court found that JHBP had provided "the 'best notice practicable under the circumstances' " and the notice was sufficient to satisfy state and federal laws and due process. As to judicial notice, JHBP contends that the trial court properly took judicial notice of the existence and content of the final order and judgment in the *Read* class action.

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[3] The Coes also argue on appeal that summary judgment could not be granted because the settlement offer that they received from the *Read* class action claims administrator did not satisfy their damages and repair costs. The record reflects that the Coes did not raise this issue in opposition to JHBP's summary judgment motion. We therefore decline to address it. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-32 [issue waived on appeal where not raised below in opposition to motion for summary judgment].)

2. Judicial Notice

At the outset, we address the issue of judicial notice since JHBP's motion for summary judgment was based on the res judicata effect of the Washington state court's February 14, 2002 final order and judgment in the *Read* class action.

The California Supreme Court has instructed that " '[t]he court may in its discretion take judicial notice of any court record in the United States. [Citation.] This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files.' [Citation.]" (*In re Vicks* (2013) 56 Cal.4th 274, 314; see Evid. Code, §452, subd. (d).) In addition, "judicial notice of findings of fact does not mean that those findings of fact are true, but, rather, only means that those findings of fact were made. [Citations.]" (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 590; *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121.)

Accordingly, the affirmative defense of res judicata may be based upon judicial notice of a court's factual findings in a court record. " 'Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully.' [Citation.] In other words, even though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action." (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148 (*Kilroy*), quoting *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569.)

For example, in *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474 (*Western Mutual*) it was held that the juvenile court's prior adjudication of the issue of the minor's intentional conduct precluded relitigation of that issue in a subsequent insurance coverage action. (*Id*. at p. 1485.) The appellate court ruled that the trial court had properly taken judicial notice of the appellate court's prior unpublished opinion in which the juvenile court's findings of intentional conduct were upheld, stating: "The trial court [in the insurance coverage action] merely determined that a particular issue—[the minor's] intent—had been previously adjudicated after a contested adversarial hearing, and, then, in accordance with collateral estoppel doctrines, did not permit the same issue to be litigated again." (*Ibid*.)

We therefore determine that the trial court could, for purposes of res judicata, properly take judicial notice of the Washington state court's factual findings regarding notice in the February 14, 2002 final order and judgment in the *Read* class action. (See *Kilroy*, *supra*, 119 Cal.App.4th at p. 148.) The trial court could also take judicial notice that the issue of the adequacy and constitutionality of the *Reed* class action notice had been previously adjudicated by the Washington state court, as indicated in the February 14, 2002 final order and judgment. (See *Western Mutual*, *supra*, 29 Cal.App.4th at p. 1485.)

Regarding notice, the February 14, 2002 final order and judgment states: "The broad notice program required by the Preliminary Approval Orders has been fully carried out. In addition to the extensive publication of notice through the broadcast and print media, advertising, and the Internet described in the Declaration of Jeanne Finegan and the Affidavit of Patrick Passarella, approximately 7,217 copies of the Notice of Proposed Settlement of Class Action approved by this Court in its Order dated November 13, 2001 have been disseminated, including mailing to all potential Class Members who could be identified in the database of JHBP. The parties established a toll-free telephone information line to respond to questions and provide additional information on the

settlement. Class Counsel responded to all written and telephone inquiries from Class Members."

The February 14, 2002 final order and judgment also states: "The notice provided fully and accurately informed the Class Members of all material elements of the proposed Settlement and their opportunity to participate in or be excluded from it; was the best notice practicable under the circumstances; was valid, due and sufficient notice to all Class Members; and complied fully with [Superior Court Civil Rules] 23, the United States Constitution, due process, and other applicable law."

3. Application of Res Judicata

The United States Supreme Court has stated: **"**The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' [Citation.] Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' [Citation.] For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion . . . .' [Citation.]" (*General Telephone Co. of Southwest v. Falcon* (1982) 457 U.S. 147, 155.) The California Supreme Court has noted that " ' "[b]y establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress . . . . " ' [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The doctrine of res judicata has been applied in the class action context. Long ago, the United States Supreme Court ruled that "there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit." (*Hansberry v. Lee* (1940) 311 U.S. 32, 42.) In California, our Supreme Court has stated:

"[T]he preclusive effect of judgments depends not on whether the action is brought on behalf of the general public, but on whether those sought to be bound by a judgment are named parties, are in privity with named parties, or are members of a class certified under class action procedures. [Citations.]" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 984, fn. 6.)

As to absent class members, "[u]nder federal and California law, a judgment in a class action is binding on class members in any subsequent litigation, though the ability to bind absent class members depends on compliance with due process regarding notice and adequate representation. [Citations.]" (*Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1555; see also *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577 [res judicata applies to a court-approved settlement agreement in a class action dismissed with prejudice]; *Johnson v. American Airlines, Inc*. (1984) 157 Cal.App.3d 427, 431 [court-approved settlement pursuant to a final consent decree in a class action will bar subsequent suits by class members].)

More specifically, the United States Supreme Court has ruled that "[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citations.] The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself [or herself] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. [Citation.]" (*Phillips*

Petroleum Co. v. Shutts (1985) 472 U.S. 797, 811-812, fn. omitted.) However, "it is not necessary to show that each member of a nationwide class has received notice. [Citation.]" (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251.)

In the present case, the Coes argue that triable questions of fact exist as to whether the notice provided in the *Read* class action was sufficient to comply with due process. They therefore seek collateral review of the Washington state court's findings in the *Read* class action that the notice given "was the best notice practicable under the circumstances; was valid, due and sufficient notice to all Class Members; and complied fully with [Superior Court Civil Rules] 23, the United States Constitution, due process, and other applicable law." The Coes have not provided any California authority for the proposition that where the state court that approved the class action settlement has deemed the class action notice sufficient to comply with due process, the sufficiency of the notice may be relitigated in a subsequent action by an absent class member where, as here, the defendant raises res judicata as a bar.

We have determined that it is proper to take judicial notice that the issue of the sufficiency of the *Reed* class action notice was adjudicated by the Washington state court, which found that the notice satisfied due process as stated in the February 14, 2002 final order and judgment. (See *Western Mutual*, *supra*, 29 Cal.App.4th at p. 1485.) Without assuming the truth of that finding, (*Kilroy, supra*, 119 Cal.App.4th at p. 148), for purposes of res judicata the sufficiency of the notice may not be relitigated in the present action. (See *Western Mutual, supra*, at p. 1485 [juvenile court's prior adjudication of the issue of the minor's intentional conduct precluded relitigation of that issue in a subsequent insurance coverage action].) Accordingly, we find no merit in the Coes' contention that they could not be bound by the Washington state court's final order and judgment as members of the *Read* class action because the class action notice provided by JHBP was insufficient to provide due process.

We recognize that in the federal courts, "[t]he extent to which a party can collaterally attack the certifying court's finding that due process was satisfied is subject to some uncertainty in the Ninth Circuit (and elsewhere)." (*Moralez v. Whole Foods Market, Inc.* (N.D. Cal. 2012) 897 F.Supp.2d 987, 997, fn. omitted; see generally Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages* (2010) 58 U.Kan. L.Rev. 917.) On the one hand, it has been held that "[c]lass members are not . . . entitled to unlimited attacks on the class settlement. Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated." (*In re Diet Drugs Products Liab. Litigation* (3d Cir. 2005) 431 F.3d 141, 145-146.) On the other hand, the Ninth Circuit decision in *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845 reviewed in some detail the adequacy of the notice given in a prior class action and rejected a claim preclusion defense in a subsequent action. (*Id*. at p. 852.)

More recently, the Ninth Circuit has stated that "[n]ormally we will satisfy ourselves that the party received the requisite notice, opportunity to be heard, and adequate representation by referencing the state court's findings. [Citation.]" (*Hesse v. Sprint Corp.* (9th Cir. 2010) 598 F.3d 581, 588 (*Hesse*).) The Ninth Circuit has also ruled that "[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." (*Epstein v. MCA, Inc.* (9th Cir. 1999) 179 F.3d 641, 648 (*Epstein*).)

However, the *Epstein* court also ruled that "[l]imited collateral review would be appropriate . . . to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue. [Citation.] This review would not, however, include reconsideration of the merits of the claim or issue, [citation] . . . ." (*Epstein, supra*,

179 F.3d at pp. 648-649.) Since the state court in *Hesse* had made no specific finding regarding the adequacy of class representation, the Ninth Circuit performed a collateral review of that issue. (*Hesse, supra,* 598 F.3d at pp. 588-589; see also *Skilstaf, Inc. v. CVS Caremark Corp.* (9th Cir. 2012) 669 F.3d 1005, 1024 [discussing the decision in *Hesse*].)

Here, in contrast to *Hesse*, our judicial notice of the the Washington state court's February 14, 2002 final order and judgment in the *Read* class action shows that the court made specific findings regarding the sufficiency of the class action notice and determined that the notice satisfied due process. Assuming, without deciding, that limited collateral review is available, we determine as matter of law that the notice given in the *Read* class action satisfied due process and the issue may not be relitigated in the present action. We therefore find no merit in the Coes' contention that they could not be bound as members of the *Read* class action because the class action notice was insufficient and did not satisfy due process.

The federal court decisions on which the Coes rely for a contrary conclusion are distinguishable. In *Gonzales v. Cassidy* (1973) 474 F.2d 67 the Fifth Circuit rejected the defendant's res judicata defense on the ground that the class representative in the prior class action had failed to appeal; no notice issue was raised. (*Id*. at p. 69.) Subsequently, in *Johnson v. General Motors Corp.* (1979) 598 F.2d 432, the Fifth Circuit rejected the defendant's res judicata defense because, unlike the present case, no notice of any kind had been provided to absent class members. (*Id*. at pp. 436-437.) The Coes also rely on a Ninth Circuit decision, *Silber v. Mabon* (1992) 957 F.2d 697, but that decision does not support their argument because it concerns a notice issue that was raised in a class member's direct appeal from the district court's consent decree approving the class action settlement and its order denying the class member's motion to extend the opt-out deadline. (*Id*. at p. 698.)

Since the Coes have implicitly conceded that the first two elements of res judicata—identity of claims and finality of the prior judgment—have been met, and we have rejected their contention that the third element—that they were a party to the *Read* class action—was not met due to insufficient notice, we conclude that the undisputed facts establish that the present action is barred as a matter of law under the doctrine of res judicata. We will therefore affirm the trial court's order granting JHBP's motion for summary judgment and the judgment in JHBP's favor.

V. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

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MÁRQUEZ, J.